Before the
Administrative Hearing Commission
State of Missouri

ST. LOUIS METROPOLITAN TOWING, Petitioner, vs. DIRECTOR OF REVENUE, Respondent.	)	No. 13-1026 RL

DECISION

On this Commission's motion, we dismiss the complaint filed by St. Louis Metropolitan Towing ("SLMT") for lack of jurisdiction.

Procedure

On June 12, 2013, SLMT filed its complaint, alleging the Director wrongfully denied its application for a salvage dealer or dismantler license. On that date, SLMT also filed a motion for expedited hearing, unopposed by the Director. On June 24, 2013, the Director filed an answer and motion to dismiss ("the June 24 motion"). SLMT filed a reply to the answer and motion to dismiss, as well as suggestions in opposition, on July 5, 2013. We denied the motion to dismiss, without prejudice, on July 8, 2013. On July 9, 2013, the Director filed a second motion to dismiss. On July 11, 2013, SLMT filed suggestions in opposition to the July 9 motion. On July 12, 2013, we denied the Director's second motion to dismiss. On that same date, the

parties jointly filed exhibits, consisting of certified records from the Department of Revenue (the "Department"), along with the affidavit of its custodian of records.

On the Commission's motion on July 15, 2013, we continued the hearing scheduled for that date to further consider whether we have jurisdiction to proceed.

Facts Considered for Purposes of this Motion

The parties do not dispute the following facts, as established by the pleadings and responses thereto:

1. SLMT is a partnership owned by William A. Bialczak and Kenneth J. Bialczak operating in St. Louis, Missouri.

2. On December 3, 2010, William A. Bialczak and Kenneth J. Bialczak pled guilty to income tax evasion under 26 U.S.C. § 7201.

3. SLMT filed an application for a Missouri salvage business license with the Department on January 17, 2013.

4. On February 4, 2013, the Department gave notice of its decision to refuse SLMT's license application (the "February 4 decision"), citing its failure to meet the requirements of § 301.559.3[1] and 12 CSR 10-23.160, which require an applicant for licensure to be of good moral character. The February 4 decision letter cited as further grounds for denial of SLMT's application § 301.562.2(3), which, in pertinent part, permits denial of licensure when an applicant has been finally adjudicated or entered a plea of guilty to an offense involving moral turpitude.

5. The February 4 decision also advised SLMT of its right to file an appeal of the Director's decision:

[1] Statutory citations are to the RSMo Supp. 2012 unless otherwise indicated.

> You are further notified that, if you were adversely affected by this decision, you may file an appeal with, and have a hearing before, the Administrative Hearing Commission, PO Box 1557, Jefferson City, MO 65102, as provided by Chapter 621, RSMo. Such appeal must be filed with the Administrative Hearing Commission within thirty days after the date this decision was mailed.

6. SLMT did not file an appeal of the Director's February 4 decision within thirty days of the date the decision was mailed.

7. On May 19, 2013, SLMT filed a second application with the Department for a Missouri business salvage license with a check for the applicable license fee. This second application was substantially similar to the original application filed on January 17, 2013.[2]

8. On June 11, 2013, the Department returned SLMT's May 19 application and fees tendered with it, along with a letter noting, in pertinent part:

> …The Department of Revenue is already in receipt of your client [SLMT's] original application on January 17, 2013. The original application to renew was denied and a Notice of Refusal To Issue or Renew License was mailed to your client on February 4, 2013. A copy of the original application and denial letter are also enclosed for your review. Because more than thirty (30) days has passed [sic] since the denial an appeal to the Administrative Hearing Commission is not available[.]

9. SLMT filed a complaint with this Commission on June 12, 2013, attaching a copy of the Department's June 11, 2013 letter as the decision it sought to appeal.

Analysis

Not every appeal filed with this Commission is afforded a hearing; we must have jurisdiction, that is, the lawful power to decide a controversy (subject matter). *Hendrix v. Hendrix*, 183 S.W.3d 582, 587-88 (Mo. banc 2006). Our jurisdiction comes from the statutes

[2] SLMT noted in its May 19 application that it had been previously denied a license. The ownership of SLMT was unchanged from the original application.

alone. *State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974). If we have no jurisdiction to hear the petition, we cannot reach the merits of the case and can only exercise our inherent power to dismiss. *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000). When we determine we lack jurisdiction, even in the face of previous reviews of the issue to the contrary, we may order involuntary dismissal of a complaint for lack of jurisdiction on our own motion. 1 CSR 15-3.436.

SLMT relies on § 621.050.1[3] as the basis for our jurisdiction. It provides:

> Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission **from any finding, order, decision, assessment or additional assessment made by the director of revenue**. Any person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative by the filing of a petition with the administrative hearing commission within thirty days after the decision of the director is placed in the United States mail or within thirty days after the decision is delivered, whichever is earlier[.]

(Emphasis added.)

While SLMT's appeal was, indeed, filed with this Commission within thirty days of the Department's June 11 letter, was that letter a "finding, order, decision, assessment, or additional assessment made by the Director"? In our order of July 12, we sidestepped this critical question and instead deemed the June 11 letter to be a denial of SLMT's application since the Director failed to act on it, citing *Rees Oil Co. & Rees Petroleum Products, Inc. v. Director of Revenue*, 992 S.W. 2d 354 (Mo. App., W.D., 1999). We also rejected the Director's argument that SLMT's reapplication violates or frustrates the thirty-day jurisdictional appeal time in § 621.051.1, reasoning that if the legislature intended to prohibit subsequent applications for licensure, it could have, but had not done so. Finding no statute providing a time frame within which an applicant

[3] RSMo 2000.

cannot re-apply, and no other authority to support the Director's position, we concluded that SLMT should be permitted to appeal the Director's June 11 denial of its application. Our conclusion was in haste, however.

The June 11 letter is not a "decision of the Director"

Section § 621.050.1 provides the right of an appeal before this Commission from any "finding, order, decision, assessment or additional assessment made by the director of revenue." To determine whether the June 11 letter is a "decision…of the director," we look to the primary rule of statutory construction, which is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words in the statute in their plain and ordinary meaning. *Maxwell v. Daviess County*, 190 S.W.3d 606, 610 (Mo. App., W.D. 2006). A "decision" is defined as "a determination arrived at after consideration; a report of a conclusion."[4]

The June 11 letter does not reflect any determination of SLMT's new application, nor does it report a conclusion of the Director on its merits. Instead, in the June 11 letter the Director declines to consider the reapplication, returns SLMT's tendered fees, and refers SLMT to the February 4 decision denying licensure. Final decisions of an agency must include the notice of appeal language required by § 621.050.1; tellingly, the June 11 letter does not. Nothing in the June 11 letter indicated to SLMT that the Director had considered and rejected its reapplication, or that SLMT had the right to appeal therefrom to this Commission.

As we noted in our previous order, an administrative agency's failure to act may constitute a reviewable denial. *Rees Oil*, supra. A "decision" includes "decisions and orders whether negative or affirmative in form." § 536.010(5). A reviewable decision has also been found to exist where an administrative body erroneously refuses to exercise the power and

[4] Merriam-Webster's Collegiate Dictionary 322 (11th ed. 2004).

authority imposed on it by law. *State ex rel. Maddox v. Garner*, 459 S.W. 2d 40, 44 (Mo. App., Spr. 1970). Nevertheless, we would have to reject all indicia to the contrary to conclude here that the June 11 letter is a "decision" within the meaning of § 621.050.1.

By determining the June 11 letter was not an appealable decision of the Director, we do not address the question of whether the Director was required to consider, and either approve or deny, SLMT's new application. We have no power to superintend another agency's procedures, *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985), and will not do so here. That question is not properly before us, and must be left for a court to determine. For purposes of our review, we conclude only that the June 11 letter is not a decision of the Director from which lies a right to an appeal pursuant to § 621.050.

SLMT failed to timely appeal the February 4 decision

In the February 4 decision letter, the Director considered SLMT's application and determined its owners, Kenneth and William Bialczak, failed to meet the good moral character requirements of § 301.559.3 and 12 CSR 10-23.160. The February 4 letter gave SLMT notice of its right to appeal the Director's decision pursuant to § 621.050.1 within thirty days of the mailing of the decision. For reasons known only to SLMT, no appeal was filed from the February 4 decision. SLMT does not now maintain it lacked notice of its appeal rights, or that it was otherwise prevented from filing a timely appeal. Having failed to file a timely appeal from the February 4 decision, SLMT waived its right to review before this Commission. See *Cardinal Glennon Memorial Hospital Coffee Shop v. Director of Revenue*, 624 S.W.2d 115 (Mo. App. 1981).

Affect of 12 CSR 10-23.160

Our previous order failed to fully consider the import of the time frame contained in 12 CSR 10-23.160, which establishes guidelines to be used by the Director in determining whether

an applicant for a motor vehicle dealer, manufacturer, boat dealer, salvage dealer, or title service agent license is of good moral character. The regulation states in pertinent part:

> (1) Except with a showing of evidence to the contrary, the following will be considered *prima facie* evidence on which the registration of a motor vehicle dealer, manufacturer, boat dealer, salvage dealer or title service agent will be denied because of lack of good moral character if the applicant:
>
> * * *
>
> (B) Within five (5) years preceding the application, has been convicted in any federal or state court of a felony, within the last three (3) years[.]
>
> (C) Within three (3) years preceding the application, has been convicted in any federal or state court of a misdemeanor[.]
>
> (2) Any dealer or applicant who receives notice of denial or revocation and desires to contest the *prima facie* of the fact(s) recited in subsection (1)(A) or (B) may request a hearing for the purpose of showing substantial rehabilitation or improvement in character sufficient to rebut the presumption created by the cited subsections. Request for a hearing should be submitted to the Director, Motor Vehicle and Driver's Licensing Division, P.O. Box 629, Jefferson City, MO 65105.

Based on this regulation, the Director's February 4 decision concluded there was prima facie evidence SLMT's owners lacked moral character because of their felony convictions in December 2010. Thirty days after the February 4 decision was mailed to SLMT, it became final for purposes of administrative review.

On its face, SLMT's new application presented no new information for the Director's consideration, particularly with regard to SLMT's ownership. The Director had already determined the Bialczaks did not meet the moral character qualification for licensure. Pursuant to 12 CSR 10-23.160, a felony conviction is *prima facie* evidence of lack of good moral character, and in the five years preceding the application, the presumption applies to any felony conviction within the last three years. As a consequence, SLMT's failure to seek review of the

Director's February 4 decision also waived its opportunity to rebut the presumption created by 12 CSR 10-23.160. The effect of the presumption, as reflected in the Director's February 4 decision, will continue until after December 2014, when the Bialczaks' felony convictions will be outside the "last three years" provision.

Such an interpretation of 12 CSR 10-23.160 is logically consistent with the statutory scheme of § 621.050.1. An applicant may challenge the Director's decision—and rebut the moral character presumption--by filing a timely appeal for review; failing that, the Director's decision is not subject to collateral attack, and must stand until the presumption from the felony conviction no longer applies.[5] To hold otherwise would create a "whack-a-mole" situation, where the Director is required to repeatedly deny identical applications until the applicant obtains the desired approval, resulting in an unwarranted increase in the Department's cost of administering the licensing statute. Our construction of a statute (or lawfully promulgated regulation) must not presume a meaningless act and should avoid unreasonable or absurd results. *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001).

Section 621.050.1 creates the exclusive avenue to challenge the Director's decision by filing a timely complaint with this Commission. *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W. 2d 599, 601 (Mo. banc 1983); see also *Gothard v. Spradling*, 586 S.W. 2d 443 (Mo. App. 1979). That appeal procedure would be wholly unnecessary, and the statute's deadline for filing an appeal rendered moot, if an applicant denied licensure is permitted to regain waived appeal rights by simply filing a new, identical application. We believe it highly unlikely that the legislature intended such a result, and we will not so interpret § 621.050.1.

[5] Note that 12 CSR 10-23.160(2) permits an applicant denied licensure to contest the prima facie presumption in a hearing before the Director, for the purpose of showing substantial rehabilitation or improvement in character sufficient to rebut the presumption. The limited facts before us do not reveal whether SLMT availed itself of this procedure.

SLMT failed to timely appeal the Director's February 4 decision; as a consequence, the Director's determination that its owners lacked the good moral character required for licensure by § 301.559.3 and 12 CSR 10-23.160 must stand, at least until the prima facie presumption embodied in that decision no longer applies. The June 11 letter is not a "decision of the Director" from which SLMT may appeal under § 621.050. Accordingly, we dismiss the complaint for lack of jurisdiction.

SO ORDERED on July 29, 2013.

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner